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No. 01-33

IN THE
Supreme Court of the United States

MARY ELIZABETH HIGHTOWER,
Petitioner,

v.

CONTINENTAL CABLEVISION OF JACKSONVILLE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, on the undisputed facts, Respondent Continental Cablevision of Jacksonville's offer of part-time employment without additional compensation equal to the value of full fringe benefits to Petitioner Mary Hightower was unreasonable?

CORPORATE DISCLOSURE STATEMENT

Continental Cablevision of Jacksonville, Inc., became MediaOne of Greater Florida, Inc., which is wholly owned by MediaOne of Delaware, Inc. MediaOne of Delaware, Inc. is a wholly owned subsidiary of MediaOne of Colorado, Inc. MediaOne of Colorado, Inc. is a wholly owned subsidiary of MediaOne Group, Inc. MediaOne Group, Inc. is a wholly owned subsidiary of AT&T Corporation. AT&T Corporation is a publicly traded corporation.

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STATEMENT OF THE CASE

Petitioner's Question Presented and Statement of the Case include numerous conclusory allegations and misstatements or omissions of fact. As to the Question Presented, Petitioner proposes that the proper question before the Court is: "Whether as a matter of law an employer's offer of a part time position with reduced benefits to the disabled employee without engaging in any interactive process is a "reasonable accommodation" under the Americans with Disabilities Act, when the employee is a victim of multiple sclerosis, who was already working a full time position with full benefits and repeatedly requested only a reduction in hours?" Pet., at *i*. However, neither the Eleventh Circuit Court of Appeals nor the United States District Court for the Middle District of

Florida cited the "interactive process" issue as a basis for their respective decisions. Pet., App. A, and Pet., App. B. Thus, Petitioner's contention in her Question Presented that Respondent failed to engage in any "interactive process" regarding her request for accommodation is a conclusory allegation and had no bearing in the two opinions below. Respondent submits that the more appropriate Question Presented is the one stated above by Respondent, involving Respondent's offer of part-time employment to Petitioner, which the Eleventh Circuit identified in its opinion as the "dispositive question" before the court. Pet., at App. A-6.

Further, Petitioner makes the conclusory allegation in her Statement of the Case that Respondent "never engaged in any interactive process with" Petitioner. Pet., at 3. Again, the "interactive process" issue played no role in the decisions below. In any event, the undisputed facts set forth in the Eleventh Circuit's decision should serve as the pertinent Statement of the Case. The Eleventh Circuit noted, among other things, the following undisputed facts: (1) that Petitioner requested an "accommodation of a five-day week, six-hour day work schedule (i.e. 30 hours per week) which, she contends, would permit her to retain full-time employment status without a loss of benefits;" (2) that Petitioner's physician gave his opinion regarding a reasonable accommodation for Petitioner in a letter to Respondent stating that "[i]t would be helpful if she could be reassigned to a part-time position;" (3) that in response to Petitioner's request, Respondent offered her "a 25-29 hour part-time position and further asserted that no full-time thirty (30) hour position with full benefits existed;" (4) that Petitioner "admitted that she was unaware of the existence of a part-time position which paid full-time benefits;" and (5) that Petitioner "presented no evidence . . . that employees who work less than forty-hours are provided full health care benefits." Pet., at App. A-3–A-4.

The Eleventh Circuit affirmed the district court's grant of summary judgment to Respondent. The Eleventh Circuit held: (1) that Respondent's offer of a part-time position was reasonable as the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), specifically provides that part-time or modified work schedules are reasonable accommodations and Petitioner's physician had opined that such an accommodation would be reasonable; (2) that Petitioner's requested accommodation of extra compensation equal to the value of full fringe benefits while working reduced hours was unreasonable; and (3) that once Petitioner rejected Respondent's offer of a reasonable accommodation, Respondent discharged its duty under the ADA and Petitioner could not demonstrate that she was otherwise qualified. Pet., at App. A-6–A-9.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE ISSUE BEFORE THE COURT IN *US AIRWAYS, INC. V. BARNETT,* IS INAPPLICABLE TO THE INSTANT CASE.

Petitioner's main argument in support of the petition is that the Court granted certiorari in *US Airways v. Barnett*, Docket Number 00-1250, on appeal from *Barnett v. US Airways, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), and therefore it should grant certiorari here. In support of her argument, Petitioner states that the Court granted certiorari in *Barnett* on the issue "of whether an employer is required to assign a disabled employee to a different position as a 'reasonable accommodation' under the ADA." Pet., at 7. Petitioner further suggests that "[i]n all probability, the Court will be addressing the proper interpretation of 'reasonable accommodation' especially in light of EEOC regulations on the interactive process." Moreover, Petitioner also speculates that "[t]he Court may also address the evidentiary standard

for a jury determination on whether an accommodation is a 'reasonable accommodation.'" Pet., at 7.

Petitioner, however, has misstated the issue before the Court in *Barnett*. The Court granted certiorari in *Barnett* "limited to Question 1 presented by the petition." *US Airways, Inc. v. Barnett*, 121 S.Ct. 1600, 149 L.Ed.2d 467 (April 16, 2001). Question 1 presented by the petition in *Barnett* was:

> Whether, as the *en banc* Ninth Circuit held below, the ADA requires an employer to reassign a disabled employee to a different position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system, or whether, as other courts of appeals have held, the ADA's "reasonable accommodation" requirement does not compel an employer to disregard the rights of other employees under its seniority policy.

The instant case does not involve the issue of reassignment as a reasonable accommodation in light of an employer's bona fide seniority system. There is no seniority system at issue in the instant case. The issue raised by *Barnett*, whether a seniority system in essence "trumps" an employee's request for reassignment as a reasonable accommodation, is not implicated at all in the instant case.

Further, to the extent that the Court in *Barnett* will address the general issue of reassignment as a reasonable accommodation, *Barnett* is still inapplicable in the instant case. The instant case involves a reduction of hours as a reasonable accommodation rather than a reassignment to a different position. In essence, this case turns on whether Petitioner's request to work a reduced schedule while still receiving full time fringe benefits is a reasonable accommodation. To characterize such a request as a request for reassignment, rather than a reduction of hours, misapprehends the actual character of the proposed accommodation. The ADA itself recognizes

the fundamental difference between "part-time or modified work schedules" and "reassignment to a vacant position" as it separately delineates each alternative in the statutory definition of what a reasonable accommodation may include. 42 U.S.C. § 12111(9)(B). Thus, even if the Court will decide the issue of "reassignment" not specifically limited to the seniority system context, *Barnett* is still inapplicable to the instant case and the petition should be denied.

Moreover, Petitioner contends without basis that the Court will "in all probability" be addressing the issues of the "interactive process" and the "evidentiary standard for a jury determination on whether an accommodation is a 'reasonable accommodation.'" As stated above, the Court specifically limited its review of *Barnett* to the issue of "reassignment as a reasonable accommodation in light of a seniority system." It is not reviewing the other aspects of the Ninth Circuit's opinion. In fact, the second question presented by the Petition for Writ of Certiorari in *Barnett* involved a review of the Ninth Circuit's holding regarding "interactive process."[1] Thus, as the Court granted review only as to the first issue in the *Barnett* petition, and specifically did not grant review of the "interactive process" issue, the Court will most certainly not be addressing the proper interpretation of "reasonable accommodation" in the context of the "interactive process." Further, Respondent does not know the basis for the Petitioner's conclusion that the Court in *Barnett* "may" discuss the evidentiary standard for a jury determination as to reasonable accommodation. Respondent, however, suggests that the Court's granting of certiorari limited to Question 1 in *Barnett* implies that such an issue is not before the Court.[2]

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[1] A copy of the questions presented from the petition in *Barnett*, retrieved from "Briefserve.com," is attached as Appendix A to this Brief.

[2] Even assuming *arguendo* that these issues were before the Court, which they clearly are not, such issues are not implicated in the instant case. As set forth in the Statement of the Case, neither the Eleventh

Because Petitioner's stated reason for the Court to grant certiorari in the instant case is the Court's pending review of *Barnett*, and *Barnett* is inapposite, the Court should deny the Petition for Writ of Certiorari.

II. THE INSTANT CASE DOES NOT PRESENT A CONFLICT BETWEEN THE CIRCUITS OR AN IMPORTANT FEDERAL QUESTION.

Rule 10 of the Rules of the Supreme Court of the United States lists certain compelling reasons why the Court grants writs of certiorari. Two of the main reasons are that a decision of a United States court of appeals is in conflict with other United States courts of appeals on the same important matter, or that "a United States court of appeals has decided an important federal question that has not been, but should be, settled by" the Court, or "has decided an important federal question in a way that conflicts with relevant decisions" of the Court. None of these compelling reasons is present in the instant case. Moreover, none of the cases cited by Petitioner illustrate a conflict between other circuits and the Eleventh Circuit's decision in the instant case.

Circuit nor the district court relied on the "interactive process" issue when deciding the case below. Further, the evidentiary standard necessary for a jury determination as to a reasonable accommodation is of little import as both lower courts determined, *on the undisputed facts*, that Petitioner's requested accommodation was unreasonable as a matter of law, and that Respondent's offered accommodation was reasonable as a matter of law. Thus, while Petitioner cites the Court's decision in *PGA Tour, Inc. v. Martin*, 121 S.Ct. 1879, 149 L.Ed 2d 904 (May 29, 2001), for the proposition that "an individualized inquiry" must be made regarding a reasonable accommodation, such an inquiry was made by the lower courts on the undisputed facts of the instant case. Pet., at 7.

A. There is no conflict among the circuits regarding the Eleventh Circuit's decision below.

As stated above, the Eleventh Circuit held that the accommodation requested by Petitioner, extra compensation equal to the value of full-time fringe benefits while working reduced hours, was not reasonable. Petitioner has cited no case, and Respondent is aware of no case, from another United States court of appeals in conflict with this holding.

Further, the Eleventh Circuit held that the part-time job with part-time benefits offered by Respondent was a reasonable accommodation on the undisputed facts of the case. Petitioner has cited no case, and Respondent is aware of no case, from another United States court of appeals in conflict with this holding.

Moreover, Petitioner has cited no case, and Respondent is aware of no case, from a United States court of appeals in conflict with the Eleventh Circuit's reasoning that "employers do not have a duty to place disabled employees in part-time positions where none exist and that there is no duty to create such positions." Pet., at App. A-8, citing *Terrell v. US Air*, 132 F.3d 621, 625 (11th Cir. 1998). In short, Petitioner has not cited a conflict among the circuits regarding any aspects of the sound legal reasoning employed by the Eleventh Circuit or the district court in the instant case.

B. The Eleventh Circuit did not decide an important federal question that should be decided by the Court or that is in conflict with previous decisions of the Court.

The courts below, on the undisputed facts, applied well-established law and found that Respondent had offered Petitioner a reasonable accommodation. Further, the courts below, on the undisputed facts, applied well-established law and found the Petitioner's requested accommodation was

unreasonable. Based on these findings, Petitioner "failed to present a *prima facie* case of ADA discrimination." Pet., at App. A-10.

It is also notable that the Eleventh Circuit's opinion below was an unpublished, *per curiam* opinion. If this case was of great public importance, or decided an important federal question, it is unlikely that the Eleventh Circuit's opinion would be unpublished.

Further, Rule 10 of the Rules of the Supreme Court of the United States notes that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Although Petitioner does not specifically assert these reasons in justifying her petition, in essence, Petitioner argues that the Eleventh Circuit relied on erroneous factual findings and the misapplication of properly stated law. Such reasons, assuming *arguendo* they existed, do not justify the Court granting the petition.

C. The Eleventh Circuit's decision is not in conflict with any cases cited in the Petition.

Although Petitioner does not specifically assert in her petition that the Eleventh Circuit's decision in the instant case is in conflict with the decisions of other circuits, Petitioner does cite two cases regarding reassignment that she contends are applicable to the instant case.

Petitioner cites *Norville v. Staten Island University Hosp.*, 196 F.3d 89 (2d Cir. 1999), for the proposition that "[r]eassignment does not constitute reasonable accommodation . . . where a position comparable to the employee's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority or other advantages in her former job." Pet., at 8, citing *Norville*, 196 F.3d at 99. Initially, as stated above, the instant case involves a reduction

of work hours and not a reassignment of positions. Therefore, on a basic level, *Norville* is inapposite. Further, unlike *Norville* where there was evidence of an equivalent open position, in the instant case there was no available position comparable to the one Petitioner sought. In fact, the Eleventh Circuit specifically found that Petitioner presented no evidence of any employees who work less than a full schedule and are provided full benefits, and that Petitioner admitted that she was unaware of a part-time position which paid full-time benefits. Moreover, Respondent offered Petitioner the very accommodation, a part-time position, that her doctor suggested would be reasonable. Thus, to the extent that Petitioner's citation to *Norville* raises the inference that *Norville* is in conflict with the Eleventh Circuit's decision below, such inference is incorrect.

Petitioner next cites *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719 (6th Cir. 2000), for the proposition that an employee's "refusal to accept one of the lower graded positions [offered as an accommodation] does not automatically preclude her from being considered a 'qualified individual with a disability.'" Pet., at 8-9, citing *Hoskins*, 227 F.3d at 728, n.3. The *Hoskins* court further stated, citing *Norville*, that if the employee could "demonstrate that an equivalent position was open, for which she was otherwise qualified, then she [would] prevail on her claim." *Hoskins*, 227 F.3d at 728, n.3. *Hoskins* is distinguishable from the instant case for the same reasons *Norville* is distinguishable. First, *Hoskins* involved a reassignment rather than a reduction of hours. Further, *Hoskins* specifically states that the employee could prevail if she shows an open position for which she was otherwise qualified. In the instant case, Petitioner has provided no evidence of such an open position. Finally, while *Hoskins* does stand for the proposition cited, the ultimate holding of *Hoskins* was to affirm summary judgment in favor of the employer on the plaintiff's ADA claim. The court held specifically that the plaintiff's request

to be permanently placed in a position that was a "rotating-type" job "would essentially require the creation of a new position rather than reassignment to an otherwise existing vacant one." *Hoskins*, 227 F.3d at 730. Thus, the plaintiff did not meet "her burden of showing that her proposed accommodation [was] a reasonable one." *Id.*

Likewise, in the instant case, Petitioner did not meet her burden that her proposed accommodation was a reasonable one. The Eleventh Circuit held that "[t]here is no legal support for [Petitioner's] contention that, as a part-time employee she was entitled to the same fringe benefits given to full-time employees." Pet., at App. A-9. The Eleventh Circuit is correct. There is no such authority and *Norville* and *Hoskins* do not provide Petitioner with such authority. Therefore, Petitioner has not brought forth, even through inference, any case that is in conflict with the decision of the Eleventh Circuit.

Petitioner has failed to demonstrate a conflict between the Eleventh Circuit's opinion and the decision of any other United States court of appeals. Further, Petitioner has failed to demonstrate that the instant case involves an important federal question. As Petitioner has failed to show any compelling reason for review, the Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, and because the petition fails to demonstrate any valid ground for review of the decision below, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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